Date: June 9, 1997

Case Nos.: 97-ERA-27/28/30

In the Matter of:

Gary F. Verdone,
David M. Collins
Complainants

and

Donald J. LeDuc,
Pro Se Complainant

v.

Northeast Utilities
Respondent

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
and
ORDER NARROWING SCOPE OF HEARING

This is a proceeding arising under the Energy Reorganization Act, 42 U.S.C. §5851 (hereinafter "the Act" or "the ERA"), and the implementing regulations found at 29 C.F.R. Parts 24 and 18. Complainant Gary Verdone, David Collins and pro se Complainant Donald LeDuc have alleged Northeast Utilities (hereinafter Respondent) retaliated against them when it terminated their employment as a part of a planned reduction in force in January 1996. Respondent has submitted a Motion for Summary Judgment asserting that Complainants' claims are barred by individually executed, valid and binding documents entitled General Release and Covenant Not to Sue.

This Judge has determined that Respondent's Motion for Summary Judgment is proper. The law, however, requires that a settlement agreement which presumes to release liability for an ERA claim shall be approved by the Administrative Review Board if fair, adequate and reasonable. Furthermore, the agreement must be found to have been entered into knowingly and voluntarily. These legal criteria have been met by the conclusive evidence presented in support of and in opposition to Respondent's Motion and I will therefore recommend, at the appropriate time, that the releases be approved, and that the Motion for Summary Judgment be granted as to those allegations in the complaints concerning allegedly retaliatory activity which pre-dates the signing of the release.[1]

---

[1]As these three complaints allege retaliatory conduct which post-dates the signing of the releases, the complaints are scheduled to go to hearing in September. Once those allegations of

Standard of Review

The standard for granting summary decision is set forth at 29 C.F.R. §18.40(d). This section, which is derived from Fed. R. Civ. P. 56, permits an ALJ to recommend summary decision for either party where "there is no genuine issue as to any material fact." **29 C.F.R. §18.40(d).** The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. **Gillilian v. Tennessee Valley Authority,** 91-ERA-31 (Sec'y 8/28/95) (**Citing Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247 (1986); **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986)). The determination of whether a genuine issue of material fact exists must be made viewing all the evidence and factual inferences in the light most favorable to the non-movant. **Id.** (**Citing OFCCP v. CSX Transp., Inc.**, 88-OFC-24 (Asst. Sec'y 10/13/94)). **See Also Laniok v. Advisory Committee**, 935 F.2d 1360 (2d Cir. 1991) (denying summary judgment based on the existence of genuine issues of material fact which the trial court had incorrectly assumed in favor of moving party); **George v. Mobil Oil Corp.**, 739 F.Supp. 1577 (S.D.N.Y. 1990) (denying summary judgment even though many of the **Bormann** factors, as discussed below, weighed in defendants' favor because genuine issues of material fact remained as to whether plaintiff voluntarily executed the release).

This Administrative Law Judge, acknowledging that summary decision is rarely granted, has applied this standard to the case at hand and concludes that Respondent's Motion shall be and the same is hereby **GRANTED**.

Statement of Facts

Each of the individual Complainants was given the opportunity to submit an affidavit stating, with particularity, the facts of the negotiation and finalization of their respective releases. The affidavits do differ from one to another, and so their contents are each summarized in turn.

Pro Se Complainant LeDuc

By document dated May 13, 1997, Complainant LeDuc has attested to the following:[2] he was employed by Respondent for twenty-two (22) years and was working as Specialist, Construction Representative, in the Station Services Department at the time of his termination. On January 11, 1996 Complainant LeDuc was informed during a telephone conversation that he was being terminated. He reported to the Personnel Office on January 12 and was told by his immediate

---

blacklisting have been heard, this Judge shall issue a Recommended Decision and Order which will be forwarded to the Administrative Review Board for its final determination. Included in that R.D.O. will be this Order Granting Summary Judgment.

[2]The assertion of facts made in Complainant LeDuc's previously submitted Opposition to Respondent's Motion are incorporated into the affidavit.

supervisor, Mr. Provencal, and Director Carl Clements that his termination was due to a lack of work[3] and that the reduction in workforce was one of Respondent's efforts to reduce costs. Complainant LeDuc received a severance package in the mail[4] and he "read it over carefully." Acting under the belief that there was validity to the reason for the lay-off, Complainant LeDuc signed the Release on January 19, 1996 without consulting an attorney.

Sometime prior to January 30, 1996 Complainant LeDuc spoke to "others" who believed they were being terminated because they had raised safety concerns.[5] He thereafter wrote to Respondent and revoked his acceptance of the Release. Complainant LeDuc also "reserved the right to re-accept the Release" by letter post-marked no later than February 26, 1996.

Prior to 're-accepting' the Release by signing on February 23, 1996, Complainant LeDuc consulted Attorney Eileen Duggan. Attorney Duggan advised Complainant LeDuc that he had no recourse action because he was laid off for shortage of work and that he would not be entitled to the severance pay if he did not sign the Release. Complainant LeDuc signed the Release, "believing the lay-off was for lack of work."[6]

Prior to signing the Release, Complainant LeDuc had no knowledge that he was terminated because Respondent considered him not a team player. Complainant LeDuc states that during a meeting with Mr. Dan Gietl and Mr. Keith Logan, investigators from the NRC OI, on October 9, 1996, he was informed his lay-off was because he was not a team player, "as indicated on the Matrix evaluation sheet shown to" Complainant by investigator Gietl.[7] Had he known of this reason for the lay-off, Complainant LeDuc states he would have "filed a lawsuit immediately."

Complainant Verdone

Complainant Verdone was notified of his termination on January 11, 1996 and received the General Release and Covenant Not to Sue that day as well. Complainant was handed a letter dated

---

[3]A pink slip, which Complainant LeDuc later received in the mail, also indicated the lay-off was due to lack of work.

[4]Complainant LeDuc fails to specify the date of receipt.

[5]These "others" are unidentified and the date on which Complainant LeDuc spoke to them remains unspecified.

[6]I pause to note Complainant LeDuc's allegation that he was terminated because of his safety concerns, physical disabilities and eligibility for retirement. This Administrative Law Judge may not exercise jurisdiction over the disability allegation or the retirement allegation.

[7]Complainant LeDuc does not have a copy of this Matrix evaluation sheet.

January 9[8], which letter stated Complainant was eligible for a severance payment calculated in accordance with number of years with the company. The letter also indicated, however, that entitlement to that severance was contingent upon signing the release.

Complainant Verdone attests he was afforded no opportunity to negotiate the pre-printed document presented in what he believes to have been a take it or leave it fashion. He further believes that attempts to modify and/or change the document would be futile.[9] Complainant Verdone also attests the January 9 letter was the only communication from the Respondent regarding the release.

Complainant Verdone signed the release on January 16, 1996 relying on Respondent's stated economical reason for the lay-off.[10] Complainant Verdone feared the resultant economic consequences if he did not sign the release and that he would be branded a whistleblower and blacklisted.[11] The signing was also based on Complainant's anger at the company. According to Complainant, he later became more 'clear-headed' and tried to find out more about why he was selected for termination.

---

[8]Attached to the letter given to Complainant was a list of job titles and ages of those to be laid-off. There were no names on the list, nor did the list identify how many of these people had filed safety concerns in the past. Accordingly, Complainant Verdone did not know, at the time he was laid-off, that other terminated employees had also raised safety complaints. Complainant states he has learned, since his signing of the release, that a "significant number" of employees affected by the January lay-off had been involved in or associated with protected activity. For example, Complainant stresses an April 1996 meeting that he attended where ten (10) out of the thirty-five to forty (35-40) individuals present had been involved in protected activity.

[9]In this regard, Complainant Verdone relies on a February 29, 1996 letter from Attorney Mary Riley, who was at the time Senior Counsel to Respondent, to Attorney Robert Heagney. This letter concerned Attorney Heagney's attempted modification of a release, identical for all intents and purposes to that presented to Complainant Verdone except for name and amount of consideration, on behalf of Attorney Heagney's client, Mr. Harry Scully. Mr. Scully was also apparently laid-off in the January 1996 downsizing. In this letter, Attorney Riley stated Respondent would not accept alterations in the release. Complainant Verdone also asserts that "other affected employees" were told no modifications would be accepted. These other affected employees remain unidentified, as does the date on which Complainant Verdone learned of this alleged information.

[10]In 1995, Complainant was told that prior to the voluntary retirements/lay-offs, Respondent would reduce the use of long term contractors. In 1996, however, Respondent increased its number of outside contractors by the hundreds.

[11]In March 1996, Complainant Verdone applied for contracted jobs at Respondent for which he states he was qualified, but for which he was not hired. Complainant maintains that he was not hired because Respondent told the contractors he was not a team player.

On or about February 1, 1996 Complainant Verdone requested his personnel file and later received it on or about February 13, 1996. The 1995 evaluation and matrix evaluation were not in the file[12] and Complainant continued to know nothing about the matrix evaluation[13] or the basis for his selection for termination.

Complainant Verdone attests he was repeatedly told the reason for the lay-off was downsizing, that the lay-off was necessary to ensure the company's competitive future, and that some sort of evaluation would be used to choose those to be laid-off.[14] Complainant Verdone did not, however, receive any information about the results of the evaluations at the time of his lay-off. In addition, he did not have his 1995 performance review at the time of lay-off and was "concerned" that the company may have used his 1994 evaluation, an evaluation on which he believed he received lower ratings due to protected activity, in selecting him for lay-off. Furthermore, Complainant references increased run-ins with his supervisor and other managers in the two years prior to his lay-off and a threat, which occurred just weeks prior to the announcement of his lay-off, as a result of Complainant's nuclear safety activities.[15]

Subsequent to his signing of the release, Verdone learned from the NRC that the NRC had in its possession the evaluation used to determine employees to be targeted for lay-off and a review Respondent had completed in regards to safety activities and employees to be laid-off. This information was reflected in a February 15, 1996 letter from Respondent to the NRC. Complainant learned the information in the NRC's possession was available for inspection in the summer of 1996.

---

[12]Complainant has footnoted a citation to Connecticut General Statute §31-128 which, according to Complainant, would require evaluations such as the Matrix evaluation and Complainant's 1995 performance review to be in the file. That is, however, a state law and any liability arising therefrom is for another tribunal to decide.

[13]It is fair to assume that Complainant Verdone intends to state he knew nothing about *the content* of the matrix evaluation because it is evident, from other statements in his affidavit, that he knew about *the existence* of an evaluation called the matrix and that it was used to select employees for the lay-off.

[14]Complainant Verdone attests "I was aware from documents distributed by the company, and from an informational meeting I attended in the fall of 1995, that management would be conducting employee evaluations in order to select employees for involuntary termination. I recall that the company told us that this evaluation was necessary in order to ensure the company's competitive future. ...I do recall that the word "matrix" or "evaluation matrix" was used when describing the evaluation process." **See** Affidavit, para. 6. Complainant Verdone later attests he was aware that supervisors and managers attended training sessions regarding the evaluation process in or about September 1995. **See** Affidavit, para. 7. Complainant, however, was not included in these training sessions even though he was a supervisor.

[15]The particularities of the run-ins and the threat are not set forth in any further detail.

Complainant received a copy of his matrix scores from an NRC official in or about April 1996.[16] The matrix evaluation showed a low teamwork rating, which was contrary to Complainant's previous performance scores in that category, and the evaluation did not account for an employee's commitment to nuclear safety. Complainant believes Respondent rated employees who had engaged in protected activity with very low marks in the teamwork category on the evaluation and that, had Complainant not received such a low rating in this category, he would not have been laid-off. In substantiation of this fact, Complainant attests he has been informed by Steve Maine, former NU supervisor, that the matrix evaluations were returned to supervisors for purposes of lowering certain scores.[17]

Complainant Collins

Complainant Collins states he was notified of his termination on January 11, 1996 and was not given a reason for the lay-off. Upon pressure, however, he was informed that his lay-off was for "performance." This reason surprised Complainant Collins[18] because of his consistent positive performance evaluations and a letter of commendation he had received. On this same day, Complainant also received a letter[19], dated January 9, stating his termination was because of an effort

---

[16]These dates cannot be correct because it is logically impossible for Complainant to have learned about the evaluation from the NRC sometime in the summer of 1996, but to have obtained a copy of his scores in April 1996.

[17]Complainant Verdone states he became aware of this information in or about September 1996, subsequent to signing the release.

[18]"Because I did not believe my performance was ever an issue with my management at NU, I was very upset when I was told that I had been selected for lay-off, and was particularly concerned that my involvement in protected activity related to nuclear safety issues was the reason I was selected for termination." **See** Affidavit, para. 7. Complainant believes that Respondent branded him a whistleblower because of his safety concerns expressed in 1992 and 1994.

[19]Attached to the letter given to Complainant was a list of job titles and ages of those to be laid-off. There were no names on the list, nor did the list identify how many of these people had filed safety concerns in the past. Accordingly, Complainant Collins did not know, at the time he was laid-off, that other terminated employees had also raised safety complaints. Complainant Collins has learned, since his termination, that a "significant portion" of the employees laid-off in January 1996 had been involved in or associated with protected activities and states that this information, had it been provided in the January 9 letter, would have altered his decision in regards to signing the release.

to reduce costs.[20] The letter further indicated Complainant would be paid a severance payment, the amount to be determined by Complainant's number of years of service to Respondent, only if Complainant signed the release.

Complainant Collins knew, from an informational meeting he attended in the fall of 1995, of Respondent's intention to use evaluations to select employees for termination and recalls the word matrix being used to describe these evaluations. Complainant did not, however, know the particulars of that evaluation.

Complainant Collins attests that between the time of his lay-off and the time he signed the release, he attempted to get as much information as possible about why he was selected for termination. In this vain, Complainant Collins telephoned Respondent's Personnel Department on or about February 15, 1996. He identified himself as a laid-off employee and requested the material and/or documents upon which Respondent had based the decision to terminate him. Complainant Collins was told by an unidentified individual that all material had been destroyed and that Respondent was unable to supply him with any information about specific reasons for his termination.

Complainant consulted Attorney Ernest Hadley prior to signing the Release and was advised that he should sign because the "portions regarding a release of ERA claims would be declared invalid in a matter of weeks by the DOL."

Collins signed his release on February 26, 1996 believing there was no opportunity to negotiate the pre-printed document presented on a take it or leave it basis.[21] Furthermore, Complainant states he signed the release believing he had no other choice because of his concern that neither Respondent, which Complainant describes as a dominant force in the local nuclear industry, nor any other power company or nuclear industry contractor would later hire him if he did not sign.

At the time Complainant Collins signed the release, he did not have the evaluation or basis for evaluation or percentage of other employees with safety concerns. He also felt he could not prove a case because he had been told by Respondent that documents were destroyed. Subsequent to his signing of the release, Complainant Collins learned from the NRC that the NRC had in its possession the evaluation used to determine employees to be targeted for lay-off and a review Respondent had completed in regards to safety activities and employees to be laid-off. This information was reflected in a February 15, 1996 letter from Respondent to the NRC. Complainant Collins was sent a copy of

---

[20]Complainant Collins states he knew of the intent to reduce the workforce based on economic reasons from company handouts distributed and informational meetings attended in the six months prior to the lay-off. Complainant was told there would be an effort to reduce long-term contractors, but the number actually increased. These contractors were hired to perform the same tasks as the laid-off employees.

[21]In this regard, Complainant Collins' attestations are identical to those made by Complainant Verdone at **supra**, n. 9.

the matrix evaluation and the ratings reflected therein learned by the NRC on or about August 15, 1996. Complainant was very upset to see the ratings, which were at odds with his prior performance evaluations, especially in the teamwork category. Complainant believes Respondent rated employees who had engaged in protected activity with very low marks in the teamwork category on the evaluation and that, had Complainant not received such a low rating in this category, he would not have been laid-off.[22]

Conclusions of Law

As a bar to the present complaint, Respondent has supplied the undersigned with three individual documents entitled "General Release and Covenant Not to Sue."[23] The document entered into by and between Respondent and pro se Complainant LeDuc was executed February 23, 1996; Complainant Verdone executed on January 16, 1996; and Complainant Collins executed on February 26, 1996. While it is clear that parties to an environmental or nuclear whistleblower case may privately settle their dispute at any time, **see** 29 C.F.R. Part 18.9, the settlement agreement must nevertheless be approved by the Secretary of Labor if it is a fair, adequate and reasonable settlement of the whistleblower complaint. **See Generally Macktal v. Secretary of Labor**, 923 F.2d 1150 (5th Cir. 1991). In regards to the legal standard applied to determine the validity of an ERA release, I note Respondent refers to a letter which is, in essence, an advisory opinion from the Administrator at the Wage and Hour Division. This Judge expresses no opinion on either the propriety of that letter or Respondent's reliance upon it.

In the matter **sub judice**, I note that the terms of the release encompass the settlement of matters arising under various laws, only one of which is the ERA. For the reasons set forth in **Poulos v. Ambassador Fuel Oil Co., Inc.,** 86-CAA-1 (Sec'y 11/2/87), I have limited my review of the release to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegation that Respondent violated the ERA.

It is further evident from the terms of the release that it is intended as a release of those employment-related claims which pre-date the signing of the release. **See** Release, p. 1, para. 1, and p. 2, at para. number 5. Accordingly, I recognize and accept the successful effort to ensure the release's compliance with cases such as **Polizzi v. Gibbs & Hill, Inc.**, 87-ERA-38 (Sec'y 7/18/89). Finally, I find the release succeeds in keeping open the necessary channels of communication between

---

[22]Complainant Collins, in comparison to Complainant Verdone, does not offer substantiation for this belief.

[23]In further reference to the individual releases executed by each of the three Complainants, I may refer to the releases in the singular as the terms of each are virtually identical. The only distinguishing factor from one to the next concerns identification of the employee invited to sign, the amount of consideration received, and the date on which the release was executed.

Complainants and relevant regulatory authorities by the language at p. 2, first full paragraph.

The more difficult inquiry is whether, as an inherent requirement that the release be fair, adequate, and reasonable, the release was entered into knowingly and voluntarily. Courts have held that a waiver of Title VII, §1981, and age discrimination claims must be closely scrutinized because of the strong public policy behind such statutes. **See Puentes v. United Parcel Service, Inc.**, 86 F.3rd 196, 198 (11th Cir. 1996) (**Citing Freeman v. Motor Convoy, Inc.**, 700 F.2d 1339, 1352 (11th Cir. 1983); **See Also Coventry v. United States Steel Corp.**, 856 F.2d 514, 522-23 (3rd Cir. 1988) ("In light of the strong public policy concerns to eradicate discrimination in employment, a review of the totality of the circumstances, considerate of the particular individual who has executed the release, is also necessary.")).

Similarly, a waiver of ERA claims must be closely scrutinized. **See Generally Kim v. Trustees of the Univ. Of Pennsylvania**, 91-ERA-45/92-ERA-8 (Sec'y June 17, 1992) (wherein the terms of a settlement agreement were "carefully" reviewed). 42 U.S.C. §5851, **et seq.**, was designed as "an administrative procedure" to "offer [] protection to employees who believe they have been discriminated against as a result of the fact that they have testified, given evidence or brought suit..." under the AEA or the ERA. **English v. General Elec. Co.**, 683 F. Supp. 1006, 1013, (E.D.N.C. 1988), **aff'd on other grounds**, 871 F.2d 22 (4th cir. 1989), **rev'd on other grounds**, 496 U.S. 72 (1990) (Citation Omitted). "Employee protection was the paramount congressional intent." **Id.** The purpose of the statute is to avoid a nuclear catastrophe by encouraging employees in the nuclear power industry to report perceived safety violations in good faith without fear of retribution or retaliation. **See, e.g., Rose v. Secretary of Labor**, 800 F.2d 563, 565 (6th Cir. 1986). There is also "a well defined and dominant national policy requiring strict adherence to nuclear safety rules.... Nothing could be plainer than the public interest in the safe operation of nuclear power plants that underlies [the] panoply of federal regulations." **Iowa Elec. Light & Power v. Local Union 204**, 834 F.2d 1424, 1427-28 (8th Cir. 1987).

It has been held that the question of whether an agreement has been entered into knowingly and voluntarily or under duress is a question of law for the Court. As such, the issue may be summarily decided. **See Stroman v. West Coast Grocery Co.**, 884 F.2d 458 (9th Cir. 1989) (entering judgment in favor of defendant in Title VII claim and dismissing the complaint because the totality of the circumstances weighed in defendant's favor). It remains, however, that the question of whether the underlying facts actually exist as the moving party asserts is a question of fact for the trier of fact. **See Generally Constant v. Continental Tel. Co.**, 745 F. Supp. 1374 (C.D. Ill. 1990); **EEOC v. American Exp. Publishing Corp.,** 681 F. Supp. 216 (S.D.N.Y. 1988); **Anselmo v. Manufacturers Life Ins. Co.**, 771 F.2d 417 (8th Cir. 1985). Accordingly, it is inappropriate to grant summary judgment whenever the materials introduced to support and oppose such a motion create a genuine issue on a material fact.

The standard for summary judgment, coupled with the strong policy behind the ERA, necessitates a careful evaluation not only of the release form itself, but also of the complete circumstances in which it was executed. In this regard, **see Coventry, supra**, 856 F.2d at p. 523.

The Second Circuit applies a totality of the circumstances standard to determine whether a release has been entered into knowingly and voluntarily. In **Bormann v. AT&T Communications, Inc.**, 875 F.2d 399 (2d Cir. 1989), the Court held the following factors to be relevant in applying this standard

> (1) the plaintiff's education and business experience, (2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law, 7) whether an employer encourages or discourages an employee to consult an attorney, and 8) whether the employee had a fair opportunity to do so.

See Generally Id. at p. 403. The Court also stated the list is obviously not exhaustive.

This Judge has carefully reviewed the documentary evidence submitted in support of and in opposition to Respondent's motion and I have applied the totality of the circumstances standard as enunciated by the Second Circuit. This Judge finds and concludes that, as a matter of law, the release at issue was entered into knowingly and voluntarily. The attempts to avoid the effect of the validly executed release are simply untenable, and thereby fail to create a genuine dispute. Even where, however, the evidence succeeds in creating a genuine dispute, the point disputed is simply not material. I shall discuss each of the circumstances upon which I have based my decision in turn, addressing the Complainants individually where their arguments diverge and collectively where they coincide.

First, I shall note there is no dispute as to the Complainants' education and experience. Each of the Complainants has received formal education to some extent at the college level. Furthermore, their intellect was effectively demonstrated in their **pro se** representation in this case for a short period of time, during which each of the Complainants submitted individual oppositions to the Motion for Summary Judgment.

Second, the release states the signatory has been given "at least 45 days" to consider and review the release and that the signatory understands he may revoke the release within seven (7) days by contacting an individual at a specified address. **See** Release, paras. 3 and 4. This Judge is prepared to hold that, as a matter of law, forty-five (45) days for consideration plus a seven (7) day period for revocation of acceptance provided Complainants ample opportunity to consult counsel and/or review the release for themselves.

Complainant Collins argues that forty-five (45) days was not enough time for him to consider the release. In this regard, he references the fact that Hartford DOL required one hundred and twenty (120) days to evaluate the release and declare it invalid and an additional ninety (90) days to reverse

that initial determination.

This argument is unpersuasive for the reason that it ignores the completely different reasons for and circumstances of review between an individual complainant and Hartford DOL. The law allows Complainant Collins, one man with personal knowledge of his employment and ensuing lay-off, a reasonable amount of time to evaluate the implications and repercussions of executing the singular document in his possession. In comparison, Hartford DOL, a Federal agency responsible for investigating a number of matters at any given time, was charged with the responsibility of investigating facts and collating information obtained from both sides of this dispute.

In addition, I shall point out that Complainant's argument cuts both ways. While Complainant Collins uses Hartford DOL's lengthy review to sustain his argument that forty-five days (45) to review plus an additional seven (7) days to revoke was insufficient, it is a fact that Attorney Hadley was able to give his opinion on the invalidity of the release in just one consultation.

Third, it is evident that the terms of the release are clear and unambiguous. The release contains language of a general nature which would release Respondent from liability under the ERA in three separate paragraphs.[24] The release also contains language which specifically identifies the Energy Reorganization Act of 1974 as one of the legal rights from which Complainants waived, released, and forever discharged Respondent. **See** Release, p. 1, para. 2.

In an attempt to convince this Judge that the release is ambiguous, Complainants Collins and Verdone point to the Hartford DOL's difficulty in determining whether the provisions were valid. As has previously been discussed, this argument is simply unpersuasive.

Fourth, emblazoned across the top of the release was the statement "NORTHEAST ADVISES YOU TO CONSULT WITH AN ATTORNEY BEFORE YOU SIGN THIS RELEASE." The release later reflects the language, in separately numbered paragraphs set off from one another, that "Northeast Utilities has advised me to consult with an attorney prior to signing this General Release and Covenant Not to Sue. I further acknowledge that I have been given a full and fair opportunity to do so" and "I have reviewed and carefully considered the terms of this Release and

---

[24]At page 1, paragraph 1, Complainant releases and forever discharges Respondent "from any and all claims, charges, grievances, demands, actions or liabilities of any nature whatsoever, known or unknown, suspected or unsuspected,..., including but not limited to claims, charges, grievances,, demands, actions or liabilities of any nature, arising from or relating in any way to any act or omission occurring prior to the date of this Release..." At page 1, paragraph 3, Complainant releases Respondent from "any and all claims that I have or may he had against the [Respondent], including ... any statutory or common law claims, including but not limited to claims for ... wrongful discharge or violation of public policy. At page 1, paragraph 4, Complainant agrees he will "never institute a claim, grievance, charge, lawsuit, or action of any kind against the [Respondent] including but not limited to claims related to my employment or termination from my employment..."

have been given the opportunity to discuss it with my attorney." **See** Release, paras. numbered 2 and 7.

For purposes of this Motion, I must accept as fact that Attorney Hadley, the first attorney of Complainant Collins, informed Complainant Collins that he was of the opinion that the Release was invalid but that Complainant Collins should nevertheless sign the release. This Judge recognizes the advice of an attorney which informs the client that a settlement agreement is not binding, although not chargeable to a respondent, may be relevant in determining whether or not an employee voluntarily signed the agreement. **See EEOC, supra** (denying summary judgment based, in part, on the factor that employee may have been advised by an attorney that the settlement agreement was not binding and, although not chargeable to defendant, this may be relevant in determining employee's voluntariness in signing). I cannot, however, recognize that factor alone as sufficient to invalidate Complainant's signing of the release.

Fifth, and finally, it is clear that the consideration each Complainant received was not an amount to which he was otherwise entitled. **See** Release, p. 1, para.1; p. 2, para. number 1. Complainant Verdone does advance some argument that the consideration was a gratuity for past performance, just as a bonus is paid for past performance. Assuming this is Complainant Verdone's attempt to argue he was entitled to this consideration as a term of his employment, I must reject it. The release, and indeed the January 9 letter Complainant Verdone admits to receiving, clearly states the consideration is an amount to which Complainant Verdone was not otherwise entitled. The fact that the determination of this amount was reached by multiplying years of service times a certain figure does not necessitate a finding that the amount was a term of employment. Complainant Verdone's argument to the contrary is unreasonable in light of his signature on a document that clearly states otherwise in two separate places and his admission to receipt of a letter which also states otherwise.

This Judge pauses to note Complainant Verdone and Collins' assertion that there was no opportunity to negotiate the release, that it was a pre-printed document presented in a take it or leave it fashion and that efforts to modify and/or change the release would be futile. I hasten to add, however, that these assertions fail to tip the scale in Complainants' favor for the following reasons.

First, although Complainants assert there was no opportunity to negotiate the release, they fail to state that they ever made an attempt at negotiation. Indeed, the affidavit of Linda Guerard, Respondent's point of contact regarding the releases, establishes that Complainants did not attempt to negotiate the terms of the release with her.

Second, Complainants Verdone and Collins have alleged an attempt and a failure to negotiate terms of the release by another employee, a Mr. Scully. I find the other employee's attempt to negotiate the release irrelevant for the reason that the attempt post-dates Complainants' signing of the release. Logically, this subsequent failure to negotiate could have no impact on the Complainants' previous execution of the release without attempt to negotiate. My finding of irrelevancy is specifically premised upon the timing in this case. Let it be known, however, that I further question

whether Complainants could properly have relied upon another employee's failure to negotiate in reaching a determination that their own personal attempt to negotiate would be futile.

Third, and finally, I remain unpersuaded by Complainant Verdone and Collins' bare assertions that the release was presented in a take it or leave it fashion without specific factual underpinnings that reasonably give rise to this interpretation.

Even if I were to generously accept the assertion that Complainants could not negotiate the release, this fact alone would not require a hearing on the issue of voluntariness. There are other indicia that Complainants knowingly and voluntarily executed the release which make unmistakably clear that they were surrendering important rights. In this regard, this Judge relies upon the **Bormann** decision, in which the Court of Appeals granted summary judgment even though there was evidence of a lack of opportunity to negotiate the terms of the waiver.[25] **See Also Nicholas v. Nynex Inc.**, 929 F.Supp. 727 (S.D.N.Y. 1996) (in which the Court granted summary judgment, despite noting the factors which weighed in plaintiff's favor were the fact that he had no role in negotiating the terms of the release and his allegation that it was presented in a take it or leave it fashion, because the majority of the **Bormann** factors overwhelmingly favored defendant and, therefore, some doubt as to whether plaintiff could have negotiated the terms of the release was simply not material).

I also briefly mention Complainants' contention that they signed the release under the duress of the impending termination and the possibility of future blacklisting. It is, however, widely recognized that the Hobson's choice of being terminated or being terminated and executing a waiver of rights in return for money is, without more, insufficient grounds to support an argument of duress. In this regard, **see Constant, supra**; **EEOC, supra**; **Nicholas, supra**. In the context of a nuclear whistleblower action, these employees state they had the added fear of potential blacklisting. This issue will be resolved at the September hearing of this matter.

Finally, this Judge shall address Complainants' repeated assertions that the release is invalid based upon Respondent's alleged falsification of the reason for the lay-off which precipitated the signing of the release. In this regard, Complainants attest that Respondent's stated reason for the lay-off, a 'lack of work' reason, was an excuse. Complainant Collins specifically sustains his argument that Respondent was not economically forced to lay-off employees by resorting to figures provided

---

[25]The Court of Appeals noted, however, that its conclusion should not be misconstrued to indicate that the employer's unwillingness to negotiate is irrelevant in considering the voluntariness of a waiver. On other facts, the Court indicated it may deny an employer's motion for summary judgment due to its alleged unwillingness to negotiate the terms of a waiver. **Bormann, supra**, at n. 1. Of course, in this case there is no evidence that Respondent was unwilling to negotiate with Complainants as Complainants simply never attempted to do so.

in the Respondent's 1995 Annual Report.[26] The allegation has also been levied that there was information that existed that would have materially affected the employees' decision to sign the Release. Complainant Collins also argues that poor performance is not a good reason for his lay-off because he received a performance excellence award and a letter of commendation from his supervisor only six weeks prior to termination.[27]

In regards to Complainant LeDuc, his act of 'revoking' the release, which act was occasioned by his conversation with 'others' who believed they were terminated because of their safety concerns, is clear evidence of his belief and/or suspicion that Respondent might have based Complainant's lay-off on his safety related activities. Similarly, Complainant Verdone was not only aware of the matrix evaluation and the fact that this was the evaluation used to determine who would be laid-off, he was also aware that he was not included in the training session concerning this evaluation even though he was a supervisor. Furthermore, Complainant Verdone was additionally 'concerned' that his 1994 performance evaluation might have been used to select him for lay-off. Complainant Collins similarly held suspicion as to the grounds for his lay-off, as is evidenced by his quest to discover as much information about the reasons for his termination as he possibly could. I shall also assume, as this Judge must for purposes of this Motion, that Complainant Collins was informed by an individual at Respondent's Personnel Department that all material used to select employees for the lay-off had been 'destroyed.'

All of this knowledge which Complainants were apparently deprived of would merely have confirmed Complainants' stated belief that Respondent acted with ulterior motives in selecting them as employees to be laid-off. Complainants' confirmation, subsequent to their signing the release, of their suspicion of retaliatory conduct based on their prior protected activity, which suspicion pre-dated their execution of the release, does not negate their waiver of their rights. **See Generally Finz v. Schlesinger**, 957 F.2d 78 (2d Cir. 1992) (wherein the court opined the employee's subsequent discovery of information which confirmed his belief as to his entitlement to a certain benefit did not negate that employee's waiver of his rights); **Bormann, supra** (wherein the court opined the

---

[26]Complainant Collins concludes that the most Respondent could have saved by laying-off 102 workers is less than 0.2% in total revenue. Furthermore, Complainant Collins quotes from an NRC deposition of manager Clinton J. Gladding, who Complainant Collins quotes as saying "there was a lot of discussion as to whether we should, you know, do it now or whether other people should be laid-off when the work load was reduced later. ...I hired a couple of contractors shortly after these people were laid-off...partly to pick up the workload that these people...the laid off people were previously handling." In addition, Complainant Collins discredits Respondent's claim of 'lack of work' by stating that he himself has been retained as a contractor for Respondent, making almost twice his previous salary.

[27]In 1991, Complainant Collins received an overall comment in his review that his major strong point was that he was a team player. In 1992 and 1993, he was rated exceptional in teamwork. Complainant Collins raised safety concerns in 1994 and his performance review for that year stated he would "need improvement" in teamwork.

employees' suspicions of employer's motives prior to signing the release and stated that those suspicions belied any claim that they did not suspect that employer may have had discriminatory motives in formulating the termination payment plan).

Conclusion

Based upon the foregoing, this Judge shall recommend, upon issuance of my Recommended Decision and Order in this matter subsequent to the September hearing, that the General Release and Covenant Not to Sue, executed by each of the Complainants, be approved and that the Respondent's Motion for Summary Judgment as to matters pre-dating the execution of each release be **GRANTED**.

The parties are hereby **ADVISED** that the scope of the hearing of this matter in September will be limited to those allegations of retaliatory conduct which post-date the signing of each Complainants' release.

_____
DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jw: